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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2023] EWHC 403 (Ch)



No. CH-2022-000112

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 20 January 2023

Before:

MR JUSTICE RICHARDS

B E T W E E N :

HARMOHINDER SINGH GILL
(as Trustee of the Gilcrest UK Pension Scheme)

Appellant

- and -

LEES NEWS LIMITED

Respondent

MR N GRUNDY KC and Mr S LANE (instructed by Lawcomm Solicitors) appeared on behalf of the Appellant.

MR B WALKER-NOLAN (instructed by David Cooper & Co) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE RICHARDS:

INTRODUCTION

- 1 This is an appeal against an order of HHJ Monty KC (the “Judge”) dated 12 May 2022 on a matter of a business lease renewal under Part II of the Landlord and Tenant Act 1954 (the “Act”).
- 2 Lees News Limited (“Lees News” or “LNL”) was the tenant under two business leases of premises in London W10 (the “Premises”). The principal minds behind LNL are Mr and Mrs Nathan who are husband and wife. The landlord is the Appellant, Mr Gill in his capacity as trustee of the Gilchrest UK Pension Scheme (the “Trust”).
- 3 The leases in question are in materially identical terms and I therefore refer to them together as the “Lease”. It is common ground that the provisions of Part II of the Act applied to both leases.
- 4 LNL sought new leases of the Premises by serving notices under s26 of the Act on 31 August 2018. The Trust objected in counter-notices under s26 served on 31 October 2018 on the grounds set out in ss30(1)(a), (b), (c) and (f) of the Act which provide, so far as material as follows:

“30 Opposition by landlord to application for new tenancy.

(1) The grounds on which a landlord may oppose an application under section 24(1) of this Act, or make an application under section 29(2) of this Act, of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:—

(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;

(b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;...

(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.”

- 5 Each of grounds (a), (b) and (c) requires the existence of a factual precondition. In the case of ground (a) there must be disrepair resulting from a tenant's failure to comply with a repairing covenant. In the case of ground (b), there must be “persistent delay” in paying rent. In the case of ground (c), there must be substantial breaches of lease obligations or the

presence of other reasons connected with the tenant's use or management of the holding. If those factual conditions are present, a court must then make an evaluative judgment, namely whether the tenant "ought not to be granted a new tenancy".

6 Following a two-day trial, the Judge gave judgment dated 12 May 2022 (the "Judgment"). In overview, he concluded that:

i) the Premises were in substantial disrepair at the date of the Trust's counter-notices owing to LNL's breach of its repairing covenant. Therefore, the factual condition precedent set to the "disrepair ground" set out in s30(1)(a) was present.

ii) LNL had persistently delayed in paying rent. Therefore, the factual condition precedent to the "arrears ground" set out in s30(1)(b) was present.

iii) The factual condition precedent to "other breaches and reasons ground" set out in s30(1)(c) was not present.

iv) The Trust had not established the requisite intention to redevelop the premises. Therefore, the factual condition precedent to the "redevelopment ground" in s30(1)(f) was not established.

7 The Judge therefore found that the factual conditions precedent to the disrepair ground and the arrears ground were both established. Nevertheless, he retained a discretion to require the Trust to grant a new lease which he exercised in favour of LNL and, in his order of 12 May 2022 (the "Order"), he directed the Trust to grant LNL new tenancies of the Premises on terms to be decided by the court if not agreed. By this appeal, the Trust challenges that exercise of discretion and also the Judge's order as to costs.

8 Underpinning most, if not all, of the Trust's grounds of appeal is the Trust's assertion that Mr and Mrs Nathan had sought during the proceedings deliberately and dishonestly to mislead both the Trust and the court. It is said that the Judge failed fully to appreciate the seriousness of that conduct and/or failed to take it into account when exercising discretion in LNL's favour. Given that the nature of the challenge is of this kind, it is necessary to deal in some detail with the Judge's factual and evaluative findings as set out in the Judgment. References in the remainder of this judgment to numbers in square brackets are to paragraphs of the Judgment unless I specify otherwise.

THE JUDGMENT

Findings on the repairing ground

9 The Judge summarised the terms of the lease at [11]. For present purposes, it is sufficient to note that the Lease contained a tenant's repairing covenant.

10 LNL served a notice under s26 of the Act seeking a new lease of the Premises on 31 August 2018 and the Trust instructed Mr Dickinson of Daniells Harrison Chartered Surveyors to inspect the premises. Mr Dickinson produced a report dated 26 October 2018 (the "2018 DH Report") setting out various items of repair and maintenance said to be required, particularly to the roof. On 31 October 2018, the Trust served s26 counter-notices on LNL opposing the grant of leases on grounds that included the disrepair ground. Lease renewal proceedings were commenced in the county court on 21 October 2019.

11 By the time pleadings closed in the county court proceedings, following answers to the Trust's Part 18 requests on 10 November 2020, LNL's position was that the Premises were

not in substantial disrepair that arose by breach of its repairing obligation. Its position as regards the roof was that any defects had been remedied by works carried out by Mack Builders in 2017, before Mr Dickinson had performed his inspection. That position was maintained in Mr Nathan's witness statement of 15 January 2021 in which he indicated a willingness to undertake "cosmetic changes" that were necessary.

- 12 In fact, contrary to the Nathans' stated position, LNL had, on 6 October 2020, entered into a contract with a building company, Let's Construction Limited ("Let's Construction") run by Mr Jason Hirrell, to perform the work set out in the 2018 DH Report (see [32]). The contract provided for the works to commence in April or May 2021 and be completed by 26 July 2021 for a contract price of £30,000.
- 13 Moreover, LNL disclosed no documents relating to its engagement of Let's Construction in its disclosure or answers to Part 18 requests ([28]). Even an updated disclosure list, prepared at a time when Mr Hirrell would actively have been carrying on the works, did not disclose the existence of the contract.
- 14 Let's Construction's engagement only came to light at an interlocutory hearing on or around 6 July 2021. There were case management directions in place that permitted both parties to serve expert evidence. The Trust was relying on expert evidence of Mr Colbourne and LNL purported to rely on an undated report of Mr Hirrell which contained no expert declaration and so did not comply with CPR Part 35. One of the items on the agenda for the 6 July 2021 hearing was whether LNL should be relieved from sanctions and so be entitled to rely on Mr Hirrell's report. It emerged that Mr Hirrell was engaged by LNL to perform works at the Premises and so he was obviously insufficiently independent to act as the expert. Faced with evidence that undisclosed works were going on at the Premises, the Judge ordered further disclosure of matters relating to works being conducted whether by Mr Hirrell or otherwise ([29]).
- 15 The Trust during the trial clearly expressed concern at LNL's conduct. The extent and nature of that concern was disputed and I will deal with that later but both Mr and Mrs Nathan were cross-examined and asked to explain what looked like a suppressing of relevant evidence. At [36] and [37], the Judge summarised the explanations that Mr and Mrs Nathan put forward and at [38] and [40], he expressed the following conclusion:

"38 It is unsatisfactory that the Claimant's stated position, maintained throughout until recently, was that no major work was required, whilst at the same time carrying out works under a contract which apparently dated back to October 2020. The position in relation to disclosure is equally clearly unsatisfactory, as is the fact that there was no mention of works or Mr Hirrell or the contract until July 2021.

...

40 Nonetheless, having heard Mr Nathan and Mrs Nathan give evidence, I am satisfied that there has been a genuine attempt to carry out the works in the Schedule, which commenced in accordance with the contract entered into with Mr Hirrell in October 2020. In my view, Mr Lane is right when he says that the delay in starting work was because Mr and Mrs Nathan hoped that Mr Nathan would be getting redundancy money from the Post Office when he gave up his sub-postmastership and that this would fund the work, but in any event I accept that the work was funded by Mr and Mrs Nathan personally by extending the borrowing on their residential mortgage."

- 16 The Judge found ([58]) that the factual premise of the disrepair ground was present by reference to the state of the Premises as at 31 October 2018, the date of the Trust’s notice under s26 of the Act. He went on to consider repairs effected after that date. Mr Hirrell completed his work some time by the end of 2021. The opinion of Mr Colbourne was that repairs were at least satisfactory in November 2021 ([26]) and while the Trust quibbled with that, the Judge ultimately accepted the position of LNL that disrepair to the Premises was addressed satisfactorily by November or December 2021 ([57]).
- 17 The Judge dealt with the exercise of his discretion to order the Trust to grant a new lease notwithstanding that the Landlord had established the presence of the disrepair ground at [59] to [61] as follows:

“59. In my judgment, the evidence from Mr Nathan and Mrs Nathan, that the business they operate from the premises is their livelihood and serves the local community is to be accepted as genuine. It strikes me that Mr and Mrs Nathan have had a rather rude awakening over the need to comply with the terms of the lease, as a result of these proceedings and in particular the July 2021 hearing and the need to get works done.

60. In answering the question as to whether it is fair to the landlord having regard to the tenant’s past behaviour to compel him to re-enter into legal relations with the tenant, I take into account the fact that Mr Gill is on the evidence I have seen and heard what might be described as a hands-off, commercial landlord. He does not appear to have engaged with the tenant at any time, ignoring emails and text messages, leaving things in the hands of his solicitors. Whilst this attitude was the subject of bitter complaint by Mr and Mrs Nathan, not only can I see nothing wrong with a landlord who takes that view, it also seems to go in the tenant’s favour when considering the question I have identified. I am, on the evidence I have heard, satisfied that the tenant would not allow itself (or more accurately that Mr and Mrs Nathan would not allow the Claimant company) to fall into breach of the repairing covenant again. This has been a very costly exercise for them.

61. I have therefore concluded that were ground (a) the only ground of opposition, I would find for the tenant. I will revisit the position overall, as I am required to do, once I have looked at grounds (b) and (c).”

Findings on the arrears ground

- 18 At [70], the Judge found LNL had persistently delayed in paying rent albeit the delays involved were of just a few days. At [71], he said:

“However, I am satisfied that this will not re-occur and that by itself ground (b) is not a good basis for refusing a new lease. Again, I will return to consider ground (b) when I look at the position in the round.”

Findings on the “other breaches” ground and the “redevelopment” ground

- 19 The Trust relied upon a number of breaches. The only one I need say anything about is as to LNL’s “conduct generally” . At [80] and [81], the Judge expressed the following evaluative conclusion:

“80. ...Mr Lane [counsel for the Trust] invited me to consider the Claimant’s conduct during this litigation including its attitude to the repairs,

disclosure and carrying out work in a race to complete the repairs all the while denying the breaches were substantial. Mr Lane also refers to the fact that at no stage during these proceedings, and even now, has the Claimant conceded there were substantial disrepairs.

81. In my judgment, there are clearly criticisms to be made of the Claimant's conduct, as Mr Lane has identified and as I have set out in the earlier part of this judgment. It seems to me that the Claimant's formal stance in these proceedings in relation to the repairs was unfortunate, and wrong, it is clear that once the Claimant appreciated the need for the works, these were effected. The position in relation to disclosure was unsatisfactory. I take these matters into account. In my view, they do not outweigh the other matters in relation to which I have made findings in relation to ground (c) above.

82. Overall, I am not satisfied that the breaches proven in respect of ground (c) are substantial."

- 20 At [96] the Judge rejected the Trust's evidence that it had the requisite intention to develop the Premises and so concluded that the redevelopment ground in s30(1)(f) of the Act was not established.

"Circling back" and overall conclusion

- 21 The Judge did not consider the repairs ground, the arrears ground and the other breaches ground entirely in isolation from each other. At [86] to [88], after citing a passage from the judgment of Gloster LJ in *Youssefi v Mussellwhite* [2014] EWCA Civ 885, the Judge "circled back" and considered the effect of the matters that the Trust had raised in its opposition under ss30(1)(a), (b) and (c) both "individually and collectively" (as the Judge put it at [88]) or "overall" and "in the round" (as the Judge put it at [61] and [70]). The Judge's conclusion following that process was that the Trust should be ordered to grant LNL new leases and the Judge expressed his conclusions as follows:

"86. I accept Mr Nathan's evidence, which was not challenged, that he inherited the premises in a poor condition. He has now spent a lot of money on doing the works. He now knows the importance of paying rent on time rather than a few days late. He now knows that the landlord expects complete compliance with the terms of the lease regarding notices. I accept the submission made on behalf of the Claimant that it is likely that the terms of any new leases would be adhered to.

87. I accept Mr Gill's evidence as I have indicated about his purely commercial attitude to these premises. A commercial landlord wants the tenant to pay rent on time and comply with the obligations in the lease.

88. Taken together, the balance is in my view plainly in favour of the tenant, and I reject the landlord's reliance on (a), (b) and (c) individually and collectively as grounds of opposition to new leases."

Costs

- 22 LNL had, therefore, succeeded in obtaining an order for new leases. However, the Trust argued not just that LNL should not have its costs but that it should positively pay the Trust's costs. The Trust relied on LNL's failure to accept that the Premises were in disrepair

despite performing remedial works that had not been disclosed. The Judge set out his conclusion in paragraphs 34 to 36 of a separate costs judgment given on 12 May 2022. He said that he was highly critical of aspects of LNL's conduct and reduced the costs that he would award to 75 per cent of those that appeared on the schedule of costs. He performed a summary assessment of those costs and ordered a payment on account.

THE GROUNDS OF APPEAL AND THE PRINCIPLES TO BE APPLIED

- 23 The Trust appeals against the Judge's orders, both to require it to grant new leases, and as to costs on seven grounds. Grounds 1 to 5 all involve, to a greater or lesser extent, the proposition that the Judge erred in exercising his discretion to require the Trust to grant LNL new leases, either by "failing to take into account" of aspects of LNL's conduct, or by failing to give "sufficient weight" to that conduct. I will apply the following approach, which I did not understand to be controversial, to those aspects of the Trust's appeals.
- 24 First, I will apply a strong respect for the Judge's factual findings, including inferences of primary fact. In the case of *Gabriele Volpi & Delta Ltd v Matteo Volpi* [2022] EWCA Civ 464, Lewison LJ summarised the relevant principles as follows:

"The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

- 25 Next, I will show a respect for the Judge’s exercise of a discretion. I should not interfere with that unless it is plainly wrong, ignores relevant considerations, takes into account irrelevant considerations or is otherwise outside the ambit of reasonable discretions that a judge could exercise.
- 26 I will also apply the principles of *Singh v Dass* [2019] EWCA Civ 360 which sets out a general caution about allowing a point to be run for the first time on appeal. Indeed, if a new point is proposed to be run on appeal, which, if it had been run at first instance would have resulted in a trial being conducted differently with regards to the evidence or have necessitated new evidence, I should be extremely hesitant to allow that new point to be run.

Ground 1

- 27 Ground 1 relies on the proposition that the Judge failed to take into account, or failed properly to take into account, five aspects of the Nathans’ conduct when deciding to exercise his discretion in LNL’s favour by ordering the Trust to grant new leases. The five factors are set out in detail in the Trust’s grounds of appeal but all relate to the Nathans’ alleged misleading of the Court and the Trust, and suppression of evidence, as regards the state of repair of the Premises. The Trust argues that these five factors are all suggestive of dishonesty on the Nathans’ part.
- 28 In overview, the Trust makes three related criticisms of the Judge’s approach. First, it argues that relevant aspects of the Nathans’ behaviour were not taken into account, or not properly taken into account at all. Second, it argues that the Judge had found that the Nathans’ behaviour was dishonest but failed to take those findings to their logical conclusion, namely that LNL “ought not to be granted” new leases. Third, it argues that, even if the Judge made no finding of dishonesty, the facts compelled such a finding and no judge, properly directed, could have found otherwise.

Whether the factors were properly taken into account at all

- 29 All of the five factors that the Trust relies upon are mentioned on the face of the Judgment. Therefore, the Trust’s argument is not that they were “ignored”, but that they were not considered in the “right” way or subjected to the “right” process of reasoning.
- 30 The Trust’s first argument is best illustrated by reference to the “repairing ground” in s30(1)(a). The parties appeared to be agreed that, once the factual precondition to that ground is satisfied, the question whether LNL “ought not to be granted” a new tenancy was not just limited to matters relating to the state of the repair of the Property but involved a much wider examination. The Trust argued that the following quote from the judgment of Gloster LJ in *Youssefi v Musselwhite* [2014] 2 P&CR 14 at [29] demonstrated that the Judge had the wrong approach in mind (the emphasis added is mine):

“under s.30(1)(a), the court has to ask itself whether ‘in view of the state of repair of the holding’, brought about by the tenant's breach of its obligation to repair and maintain the holding, the tenant ‘ought not to be granted’ a new tenancy. This involves the court, for the purposes of this subsection, **focusing exclusively on the state of repair** and asking itself whether, looking forward to the hypothetical new term, ‘the proper interests of the landlord would be prejudiced’, by continuing in a landlord/tenant relationship with this particular tenant (as per the formulation in *John Kay Ltd v Kay*); or, put another way, whether it ‘would be unfair to the landlord’ (as per the formulation of Morris LJ in *Lyons v Central Commercial Properties London Ltd*), having regard to the tenant's past performances and

behaviour **in relation to its obligation to repair and maintain the holding**, if the tenant were to be ‘foisted on the landlord for a new term’ (as per the formulation of Harman J in *Lyons v Central Commercial Properties London Ltd*). The discretion is not circumscribed in any way other than by the requirement that, in asking itself the question whether the tenant ‘ought not to be granted’ a new tenancy, **the court has to focus on the state of repair of the holding.**”

- 31 It is said that the Judge’s flawed approach is demonstrated by the fact that the analysis of s30(1)(a) at [52] to [61], and of s30(1)(b) at [62] to [71], does not mention the reprehensible behaviour at all because the Judge did not consider the behaviour relevant to repairs or to the timely payment of rent. It is also said that the conduct was not taken into account in considering s30(1)(c).
- 32 The hearing before the Judge was not transcribed and I have not been provided with a note of that hearing. I therefore have to infer how the parties’ cases were presented from the Judgment and skeleton arguments. I am not satisfied that the Judge was asked to approach the question of LNL’s alleged dishonesty as a factor that justified the court in declining to exercise its discretion to order the grant of new leases. I accept that in submissions on behalf of the Trust, Mr Lane (who appeared for the Trust below) invited the Judge to be critical of Mr and Mrs Nathan’s conduct, as advocates do when they consider that witnesses have been cagey, or evasive, or have given conflicting accounts. I am also satisfied that the Judge was invited to conclude that LNL’s compliance with its disclosure obligations had been unsatisfactory. I am not, however, satisfied that these submissions “joined the dots” so as to ask the Judge to move beyond adverse findings on the Nathans’ credibility as witnesses and conclude that dishonesty on their part was a reason why discretion should not be exercised in LNL’s favour under s30(1)(a), (b), or (c). If the Trust had put its case in this way, I consider that the Judge would have recorded that in his careful and detailed Judgment. Mr Grundy accepted in answer to a question from me that the Trust cannot positively say that the case was put in this way.
- 33 I am reinforced in my conclusion by looking at the Trust’s skeleton argument that was provided to the Judge. That suggested that the conduct of Mr and Mrs Nathan might go to the prospects of them complying with covenants under any new lease that was granted but makes no general point that their conduct was dishonest, or that if it was, that that was a separate reason why discretion should not be exercised in LNL’s favour.
- 34 I am not satisfied on what is before me that an allegation that the Nathans were dishonest was put fairly and squarely to them in cross-examination. Paragraph 26 of the Trust’s skeleton argument before the Judge spoke in more measured terms about Mr and Mrs Nathan being “less than candid about their repairing obligations”.
- 35 Overall, therefore, I am not satisfied that the Judge was invited to conclude that the Nathans’ alleged “dishonesty” was a separate and free-standing reason why LNL “ought not to be granted” new leases.
- 36 I also reject the assertion that the Judge took a “compartmentalised” approach to the exercise of his discretion which resulted in the Nathans’ unsatisfactory behaviour being overlooked. The parties are agreed that if, and to the extent that the quote from *Youssefi* set out above sets out a compartmentalised approach, that is not a correct statement of the law. Read in isolation, the Judge’s self-direction by reference to the quote from *Youssefi* could be seen as setting out an incorrect approach in so far as it suggests that the discretion under s30(1)(a) is focusing exclusively on the state of repair. However, the structure of the Judgment as a

whole demonstrates that the Judge recognised the need to “circle back” and consider the combined effect of all his findings relating to ss30(1)(a) to (c) before deciding how to exercise his discretion, or make the value judgment, implicit in the question of whether LNL “ought not to be granted” new leases. That structure negatives the suggestion that the Judge thought that he only needed to consider matters relevant to repair when considering his discretion under s30(1)(a) or matters relating to payment of rent when considering s30(1)(b).

37 Moreover, the quote from *Youssefi* does not set out the entirety of the Judge’s self-direction on the way in which he should exercise his discretion, or perform his value judgment, when considering if LNL “ought not to be granted” new leases. At [50], the Judge quotes a section from Ormerod LJ’s judgment in the case of *Lyons v Central Commercial Properties (London) Ltd* [1958] 1 WLR 869 to the effect that conditions (a), (b), and (c) should be looked at having regard to all the circumstances so that in particular, when performing the “ought not to be granted” evaluation under s30(1)(a), matters going beyond repair are relevant. That self-direction, which comes just before the Judge considers s30(1)(a) is at odds with the asserted “compartmentalised” approach.

38 The next point is that the Judge made findings on the Nathans’ behaviour. At [80] and [81], he expressly weighed up the significance of that conduct when considering whether the factual precondition to the “other breaches” ground in s30(1)(c) was present. I do not, therefore, accept that the Judge ignored matters of the Nathans’ conduct when considering whether LNL “ought not to be granted” a new tenancy for the purposes of s30(1)(c). I am also not satisfied that he somehow came to ignore what he regarded as the significance of those matters when he came to look at s30(1)(a) or 30(1)(b). On the contrary, the Judge’s process of “circling back” suggests to me that the Nathans’ conduct was taken into account as part of that evaluation.

39 I therefore reject the Trust’s first argument set out in paragraph 28 above.

What findings did the Judge make on the Nathans’ conduct?

40 The Trust submits that the Judge had, in fact, found that Mr and Mrs Nathan were dishonest but failed to follow through the consequences of that finding. It argues that the Judge was “too polite”. I reject that submission.

41 The Judge made findings about what Mr and Mrs Nathan did. He summarised those at [8] as being to deny that the Premises were in disrepair even though, at the time of those denials, they were engaging builders to carry out works. He amplified on the issue at various points, including [35], [36] to [38], [53], [80] and [81]. The Judge would well know that a finding of dishonesty is a specific and serious finding and yet he did not make any such express finding at any point in the Judgment. He did not refer in his Judgment to any case law on the meaning of dishonesty. Instead, when criticising the Nathans’ conduct he used terms such as “unsatisfactory”, or “wrong”, or similar. If the Judge had intended to make a finding of dishonesty, he would have said so expressly. I reject the second argument summarised in paragraph 28 above.

Was the Judge obliged to make findings of dishonesty?

42 The Trust’s next criticism is that, even if the Judge did not make a finding of dishonesty, the facts were such that dishonesty was the only reasonable conclusion available to him.

43 I have reached the clear conclusion that the Trust has not overcome the high hurdle set out in *Volpi v Volpi* that would enable me to interfere with the Judge’s factual and evaluative conclusion. There was a perfectly rational basis for concluding that, while aspects of Mr and

Mrs Nathan's conduct of the litigation could be criticised, they had not been dishonest. This is not a re-trial and so it would not be right for me to go into all the relevant evidence, not least since as this is an appeal, I have not been taken through all that evidence or heard any cross-examination of witnesses. However, the following points at least provide rational support for the Judge's evaluative conclusion that the Nathans had not behaved dishonestly.

- 44 There were certainly occasions on which Mr and Mrs Nathan advanced a position that was not correct but at a more general level, there was some overall consistency in their position. In a letter of 19 November 2018, LNL said, through its solicitors, that the premises were in minor disrepair and that, if the Trust persisted in its objections to new leases under the repair ground in s30(1)(a), it would achieve nothing since LNL would simply effect the necessary works before the hearing in the county court. Whatever happened subsequently, the letter of 19 November 2018 demonstrated that LNL mentioned up front the possibility that it would seek to effect remedial works before the hearing in the county court.
- 45 Secondly, it was the Nathans themselves, ultimately, who revealed the existence of the ongoing works as a consequence of their flawed attempt to put forward Mr Hirrell as an expert witness. Obviously, Mr Hirrell was in no way qualified as an independent expert but Mr Nathan disclosed in his witness statement made for the July 2021 hearing that Mr Hirrell's acquaintance with the state of the Premises came from the fact that he was doing remedial work there. The ongoing works were disclosed belatedly but they were disclosed and the Judge was entitled to conclude that this was not consistent with dishonesty.
- 46 Finally, the Judge characterised LNL's stated position as being that no major work was required ([38]). That was a broad summary. It was not intended to cover the whole continuum of the position that Mr and Mrs Nathan took throughout the proceedings. There were occasions on which LNL made statements that were incorrect and were not merely limited to an evaluation of whether work was major or not. However, the Judge's conclusion at [38] was his overall impression of a continuum of correspondence. The Judge found that LNL, on occasions, went too far and obviously went too far in describing works as "cosmetic". However, it is possible for there to be honest disagreement about whether particular works are "major" or not and it was reasonable for the Judge to conclude, having regard to the continuum of the entire correspondence, that LNL's position on this issue was not dishonest.
- 47 The Trust argues that the considerations that I have set out above are displaced by other considerations and I was shown a detailed analysis of the pleaded case, Part 18 replies, disclosure, and other matters. I appreciate the detail and thoroughness with which that case was advanced but ultimately that was simply a matter of "island hopping" in a sea of evidence as Lewison LJ memorably put it in *Fage v Chobani* [2014] EWCA Civ 5. I was shown evidence of facts that might have led to a different conclusion but that is not enough to displace the conclusion that I consider that the Judge ultimately reached which, as I have explained, was available to him.
- 48 I therefore reject all of the arguments that the Trust advances in support of its Ground 1 and so dismiss the appeal on Ground 1. Having done so, I can deal with the other grounds more shortly.

Ground 2

- 49 Ground 2 is a specific point as regards the Judge's alleged error in failing to have regard to "the surreptitious manner in which LNL carried out the remedial works" which LNL argues was itself a breach of Clause 2(8)(b) of the lease. Ground 2, therefore, is premised on the proposition that there was actually a breach of Clause 2(8)(b) of the Lease.

50 LNL's repairing obligations included the following covenants:

“2(8)(a) At all times during the term to repair and keep the demised premises in good and substantial repair and condition to the satisfaction of the Landlords or the Landlords' surveyors.

2(8)(b) If at any time during the term whether by reason of age or state of dilapidation or any requirement of any competent authority or otherwise it shall become necessary for the purposes of putting or keeping any building or structure from time to time comprising the demised premises or any part thereof in a first class condition and state of repair to rebuild such building or structure or any part thereof then the Tenant shall at their own cost and with all practical speed and under the direction and to the reasonable satisfaction of the Landlords' Surveyors and in accordance with plans and specifications to be previously approved by them in writing carry out such rebuilding.”

- 51 Mr Lane urged on me that Clause 2(8)(b) should be construed together with Clause 2(8)(a) as providing the Trust with a right of oversight when significant work is needed on the premises, or a part thereof, which has fallen into disrepair. In performing significant repair works without notifying the Trust, it is argued that LNL was necessarily in breach of Clause 2(8)(b) because the works were not performed “under the direction of” the Landlord’s surveyors. This is not a point that was developed in any detail before the Judge.
- 52 In my judgment, the approach above overlooks an important element of Clause 2(8)(b). That Clause applies only if a precondition is satisfied, namely that age or dilapidation, or the requirements of a competent authority, makes some rebuilding of a building or structure necessary to put it back into a first class position and state of repair. If that condition is satisfied, LNL was obliged to perform the rebuilding under the direction of the landlord’s surveyors. The obligation is predicated, therefore, on a need to rebuild any part of a building or structure.
- 53 The question of whether the works that LNL undertook involved “rebuilding” a building, structure or part thereof was simply not canvassed in the proceedings before the Judge. It was not suggested in the Trust’s skeleton argument below that the works that LNL was performing did amount to a “rebuilding”. No evidence was led on that issue specifically.
- 54 Mr Grundy submitted that the issue could and should have been dealt with by reference to the evidence that was before the Judge but I do not agree with that. It is far from obvious to me that the description of works in the 2018 DH Report that I was shown was sufficient to answer the question of whether the works constituted a “rebuilding” of any part of a building or structure.
- 55 It follows that the Trust is seeking to raise a new issue on appeal. I am quite satisfied that, if the point had been raised below, further evidence would have been needed and/or the trial would have been conducted differently as regards the evidence then produced. Moreover, there might well have been a need for further evidence on the significance of any breach of Clause 2(8)(b) since that would be an element in the evaluative conclusion on whether a new lease “ought not to be granted”. Applying the principles set out by Haddon-Cave LJ at [16] to [18] of *Singh v Dass* [2019] EWCA Civ 360, I do not consider it is right for this point to be considered for the first time on appeal and I dismiss the appeal on Ground 2.

Grounds 3 and 4

- 56 Grounds 3 and 4 involve criticisms of the Judge’s conclusion to the effect that he was confident that LNL would comply with the terms of any new leases that were granted (see, for example, [60] and [71]). By Ground 3, the Trust asserts that the Judge failed properly to consider whether, in the light of its conduct of the litigation generally, LNL would comply with Clause 2(8)(b) specifically. By Ground 4, the Trust argues that, given LNL’s conduct of the litigation, no reasonable judge could have been confident that LNL would comply with its obligations under a repairing covenant in a new lease including, in particular, Clause 2(8)(b).
- 57 Ground 3 fails for the same reason I have given when dismissing Ground 2. The Judge was not obliged to conclude that there had been any historic breach of Clause 2(8)(b), given my conclusions on the construction of that clause. Therefore, the premise of Ground 3, that there would likely be further similar breaches of Clause 2(8)(b) is not made out.
- 58 Grounds 3 and 4 are also premised on the proposition that the Judge should have given weight to the Nathans’ averred dishonesty that was the subject-matter of Ground 1. I have already explained in my discussion in Ground 1 that the Judge neither found, nor was obliged to find, the Nathans to be dishonest and was entitled to his more nuanced conclusion that aspects of the Nathans’ behaviour were “unsatisfactory” or “wrong”. These more nuanced conclusions did not compel the Judge to conclude that LNL would not comply with its obligations under either Clause 2(8)(a) or Clause 2(8)(b). The Judge gave reasons for concluding why he considered LNL would comply with future obligations under its leases, for example: (i) the repairs that LNL effected were funded out of personal borrowings of Mr and Mrs Nathan; (ii) the importance of LNL’s business to Mr and Mrs Nathan’s livelihood; and (iii) the fact LNL inherited the Premises in a bad condition and so had not presided over a deterioration in the state of the Premises over their period of ownership. The Judge was entitled to conclude that he could be confident that LNL would comply with its obligations under the repairing covenant in any new leases that were granted and I dismiss the appeals on Grounds 3 and 4.

Ground 5

- 59 Ground 5 is a complaint that the Judge erred in law in finding that the conduct of LNL criticised under Ground 1 was not “any other reason connected with [LNL’s] use or management of the [Premises]” (to paraphrase s30(1)(c) of the Act) that was relevant to the question whether LNL “ought not to be granted a new tenancy”.
- 60 Mr Grundy showed me *Horne & Meredith Properties v Cox and another* [2014] EWCA Civ 423. I accept that behaviour during litigation on a claim for a new business tenancy is capable of engaging s30(1)(c). However, the Judge did not say any differently. In his analysis of s30(1)(c), he mentioned the behaviour of Mr and Mrs Nathan as something that was relevant and did not find that those matters were unconnected with LNL’s use or management of the Premises. By Ground 5 the Trust also argues that the Judge failed to give “sufficient weight” to LNL’s conduct criticised in Grounds 1 and 2. That argument fails for reasons I have given in dismissing the appeal on Ground 1.
- 61 Accordingly, Ground 5 is dismissed.

Ground 6

- 62 Ground 6 deals with costs. The Trust’s first proposition is that the Judge should have found, or did find, that the Nathans’ conduct discussed in the context of Ground 1 was dishonest but

failed to take into account the seriousness of that conduct in assessing costs. That aspect of Ground 6 fails for the reasons that I have already given for dismissing Ground 1.

- 63 The second aspect of Ground 6 is that even given the findings that the Judge did make, the only reasonable conclusion was to award the Trust its costs. It is said that the Judge got so caught up in his criticism of the Trust's position and his perception that it was making an unmeritorious point in arguing for its costs even though LNL had succeeded in securing an order for a new lease, that he lost sight of the true position, namely that most of the Trust's costs were incurred on the repair issue on which LNL had largely lost.
- 64 That proposition is paradigm example of a challenge to a judicial discretion. The Judge had been case managing the proceedings throughout. He dealt with the trial. He was far better placed than me to decide what, if any, reduction should be made to LNL's claimed costs to reflect the conduct that he regarded as unsatisfactory. The Judge's criticism of the Trust in seeking its costs was measured. Of course, I understand that different judges could evaluate the consequences of Mr and Mrs Nathan's behaviour differently and might have made a more substantial reduction than the 25 per cent reduction that the Judge made. However, in my judgment, the Judge did not step outside the generous bound of his discretion in saying that LNL should have 75 per cent of its costs. I dismiss Ground 6.
- 65 Ground 7 has now been dealt with by consent.
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CERTIFICATE

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